United States Service Industries, Inc. *and* Service Employees International Union, Local 525, AFL–CIO. Cases 5–CA–21399 and 5–CA–21691

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On April 28, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Charging Party and the Respondent (USSI) filed exceptions and supporting briefs, and the Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. The Respondent contends that, because several of the employees struck more than one time, this was an intermittent strike not protected by the Act. We disagree.

The judge stated, and we agree, that ''hit and run'' strikes engaged in as part of a planned strategy intended to ''harass the company into a state of confusion''[2] are not protected activity. However, we also agree with the judge that in the instant case there is no evidence that any such strategy was in place, and that the mere fact that some employees may have struck more than once does not render their conduct intermittent striking. See *Chelsea Homes*, 298 NLRB 813, 831 (1990); *Robertson Industries*, 216 NLRB 361, 362 (1975), enfd. 560 F.2d 396, 398–400 (9th Cir. 1976). We conclude that the Respondent has failed to establish that the employees were engaged in unprotected intermittent striking.

2. In support of its argument that the strikers were engaged in unprotected activity and therefore not entitled to reinstatement, the Respondent in its exceptions relies on Administrative Law Judge Arline Pacht's decision in *Service Employees Local 525 (General Maintenance)*, Case 5–CB–6558 (JD 85–92). That case is currently pending before the Board on exceptions. At the page cited by the Respondent, Judge Pacht found, inter alia, that the Union violated Section 8(b)(4)(B) by picketing at Washington Square (1050 Connecticut Avenue, N.W.) after November 7, 1990, at times that violated the *Moore Dry Dock*[3] standards for common situs picketing. Judge Pacht also found that a number of the Union's written materials constituted direct evidence of an unlawful secondary objective. The Respondent argues that, therefore, a finding is required that the employees' conduct in the instant case was unprotected. We find no merit in this exception.

First, we reject the Respondent's contention because the Respondent has failed to timely raise this defense. At the hearing on December 7, 1993, more than a year after Judge Pacht's decision, the judge in the instant case asked the Respondent's counsel to state his position as to why the strikers were not taken back. Counsel's reply cited two factors: (1) that some of the employees engaged in intermittent strikes and were not entitled to reinstatement, and (2) that the Respondent already had sufficient personnel in the building. (Tr. 774.) Counsel's reply, however, made no reference to the employees' participation in secondary picketing as a defense for failure to reinstate them, nor did the Respondent advance this theory in its brief to the judge. This defense was accordingly not considered by the administrative law judge in this proceeding, and may not be considered for the first time on exceptions to the Board. See *Wind-Chester Roofing Products*, 302 NLRB 878 fn. 1 (1991); *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990); *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

Second, even if the defense had been timely raised, the Respondent has introduced no evidence in this proceeding to support it. Thus, there is no evidence in the record of this case establishing that USSI was not present in the building at the time these employees picketed, or that these employees otherwise participated in unlawful secondary picketing. Accordingly, we cannot find on the record before us that the employees were engaged in unlawful secondary activity.

To the extent that the Respondent may be citing Judge Pacht's decision in support of its contention that the strikes in the instant case were part of a nationwide campaign and, therefore, constituted intermittent striking, we still find no merit in this exception. As stated above, the mere fact that some employees struck more than one time is not sufficient evidence on which to base a finding of unprotected intermittent striking. On the record before us, we cannot make a finding that the striking employees in the instant case were en-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *Pacific Telephone Co.*, 107 NLRB 1547, 1548 (1954).

[3] *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950). Specifically, the judge found that there had not been compliance with the first and second *Moore Dry Dock* requirements that the picketing take place at times when the primary employer is engaged in its normal business at the common situs.

gaged in a campaign to harass the Company into a state of confusion.[4] Based on the evidence in this case, we agree with the judge that these employees were engaged in a protected economic strike and were thus entitled to reinstatement in the absence of proof that they had been permanently replaced.

3. The Respondent has excepted to the judge's finding that the employees made a valid unconditional offer to return to work. The Respondent contends that the offer to return to work was conditioned on the employees' returning to the same job on the same shift and also contends that there is no showing that the strikers designated the Union to make any offer for them to return. We find no merit in this exception.

The August 3 and December 5, 1990 letters which the Union effectively delivered to the Respondent are set out in full in the judge's decision. Each letter specifically states that it is an unconditional offer to return to work. The offers are not rendered conditional by the subsequent statement that the employees are ready to return to their same shifts and buildings. An application will not be treated as conditional unless it gives the employer reason to conclude that any offer of equivalent employment would be rejected. *Continental Industries*, 264 NLRB 120 (1982); *Hartmann Luggage Co.*, 183 NLRB 1246 (1970), enfd. in relevant part 453 F.2d 178 (6th Cir. 1971).

We find that the Union made a valid unconditional offer to return on behalf of the employees. Although there is no evidence that the Union was the certified or recognized representative of the striking employees, the strike was organized and supervised by the Union. Striking employees had tee shirts and picket signs supplied by the Union. They were paid strike benefits by the Union, and the strike was ended by a union-conducted vote. On August 3, 1990, James Hessey, who was then organizing director for the Union, was accompanied by some of the strikers when, prior to attempting to deliver the letter discussed above, he made a verbal offer on behalf of all striking employees to return to work. Under such circumstances, we agree with the judge that the Union clearly acted as agent of the employees in making the unconditional offers to return to work. We find that it was not necessary for the Union to have majority status in order to make these offers. See *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1017–1018 (6th Cir. 1983).

4. The Charging Party has excepted to the judge's failure to provide a broad cease-and-desist order. We find merit in this exception. In light of the nature and extent of the Respondent's violations, i.e., its total disregard for the *Laidlaw*[5] rights of its employees, its commission of unfair labor practices at seven different locations and against numerous employees, its unlawful threats to discharge strikers, its unlawful bonuses to nonstrikers, and its unlawful discharge of an employee in *United States Service Industries*, 314 NLRB 30 (1994), on the ground that she had ''been stirring up the other workers,'' it is clear that the Respondent has demonstrated a proclivity to violate the Act and has exhibited a general disregard for the employees' fundamental statutory rights. Accordingly, we conclude that under the standard of *Hickmott Foods*, 242 NLRB 1357 (1979), a broad remedial order is warranted.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United States Service Industries, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Discouraging membership in the Union by unlawfully failing and refusing to reinstate its employees or to place their names on a preferential hiring list because they have engaged in a protected concerted strike for their mutual aid and protection.

(b) Granting special bonuses as compensation to employees because they refrain from lawful strike activity and/or telling striking employees that the Respondent has done so.

(c) Interrogating employees concerning the content of union meetings.

(d) Threatening employees with discharge if they go on strike.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the following employees who engaged in the strike beginning July 26, 1990, and any other employees whose names are currently unknown but who engaged in that strike, immediate and full reinstatement to their former jobs, or to substantially equivalent positions if those jobs no longer exist, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any em-

[4] Cf. *Pacific Telephone*, supra.

[5] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[6] In sec. IV,A, par. 11 of his decision, the judge noted that the complaint had been amended to delete the name of Pearly M. Jennifer. In his conclusions of law the judge deleted that name from the list of employees entitled to reinstatement. However, the judge inadvertently failed to delete Jennifer's name from the list of discriminatees in the recommended Order and notice. We shall modify the recommended Order and the notice accordingly. We shall also modify the reinstatement language in the judge's recommended Order to conform to the notice and shall include an expunction requirement.

ployee hired as a replacement in any positions formerly worked by the striking employees from July 26, 1990, to the present, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them in the manner set forth in the remedy section of the judge's decision:

Howard Adams	Bertram Madden
Atricia Armstead	Kelly Marshall
Evelyn Barnett	Melinda Moore
Marvin Beeman	Howard Murray
Sheila Bell	Ketzi Ortiz
Willie Bell	Merida Lee Ramirez
Rosa Lee Bunn	Philip Scott
Dyeman Carr	Douglas Spencer
Melita Christmas	Robert Taylor
Dave Cousley	Andrew Terry III
Sherwin R. Jackson	Albert Williamson
Randolph James	James Wilson

(b) Offer the following employees who engaged in the strike beginning October 30, 1990, immediate and full reinstatement to their former jobs, or to substantially equivalent positions if those jobs no longer exist, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employee hired as a replacement in any positions formerly worked by the striking employees from October 30, 1990, to the present, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them, in the manner set forth in the remedy section of the judge's decision.

Rosa Berrios	Doris Brown
Mary Burrell	Angela Williams
Andres Gonzalez	Bernice Noble
Gisela Sawyer	Donald Monroe
Ade Thomas	

(c) Remove from its files any references to the unlawful failure to reinstate, and notify the striking employees in writing that this has been done and that the failure to reinstate will not be used against them in any way.

(d) Pay $20 to each of the employees who engaged in the May 30, 1990 strike against the Respondent who did not receive the $20 bonus paid to nonstrikers on May 31, with interest, computed in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Washington, D.C. offices and facilities, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to reinstate our employees or to place their names on a preferential hiring list because they have engaged in a protected concerted strike for their mutual aid and protection.

WE WILL NOT grant special bonuses as compensation to employees because they refrain from lawful strike activity and/or tell striking employees we have done so.

WE WILL NOT interrogate employees concerning the content of union meetings.

WE WILL NOT threaten employees with discharge if they go on strike.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the following employees who engaged in the strike beginning July 26, 1990, and any other employees whose names are unknown but who engaged in that strike, immediate and full reinstatement to their former jobs, or to substantially equivalent positions if those jobs no longer exist, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employee hired as a replacement in any positions formerly worked by the striking employees from July 26, 1990, to the present and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, with interest.

Howard Adams	Bertram Madden
Atricia Armstead	Kelly Marshall
Evelyn Barnett	Melinda Moore
Marvin Beeman	Howard Murray
Sheila Bell	Ketzi Ortiz
Willie Bell	Merida Lee Ramirez
Rosa Lee Bunn	Philip Scott
Dyeman Carr	Douglas Spencer
Melita Christmas	Robert Taylor
Dave Cousley	Andrew Terry III
Sherwin R. Jackson	Albert Williamson
Randolph James	James Wilson

WE WILL offer the following employees who engaged in the strike beginning October 30, 1990, immediate and full reinstatement to their former jobs, or to substantially equivalent positions if their jobs no longer exist, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employee hired as a replacement in any positions formerly worked by the striking employee from October 30, 1990, to the present, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of discrimination against them, with interest:

Rosa Berrios	Doris Brown
Mary Burrell	Angela Williams
Andres Gonzalez	Bernice Noble
Gisela Sawyer	Donald Monroe
Ade Thomas	

WE WILL remove from our files any reference to the unlawful failure to reinstate, and WE WILL notify the striking employees in writing that this has been done and that the failure to reinstate will not be used against them in any way.

WE WILL pay $20, with interest, to each of our employees who engaged in the May 30, 1990 strike against us and did not receive the $20 bonus paid to nonstrikers on May 31.

UNITED STATES SERVICE INDUSTRIES, INC.

Ronald Broun, Stephen C. Bensinger, and *Angela S. Anderson, Esqs.,* for the General Counsel.
Joel I. Keiler, Esq., for United States Service Industries, Inc.
Eunice Washington, Larry Engelstein, and *Virginia I. Diamond, Esqs.,* for Service Employees International Union, Local 525, AFL–CIO.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me in Arlington, Virginia, on June 24, 25, and 26, 1991, and December 7, 8, and 9, 1993,[1] pursuant to charges and amended charges filed by Service Employees International Union, Local 525, AFL–CIO (the Union) on August 10 and October 26, 1990, and January 4 and February 22, 1991, and complaints issued which, with amendments made thereto, allege United States Service Industries, Inc. (the Respondent) has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by making threats and other statements to employees and by failing and refusing to reinstate strikers or to place them on a preferential hiring list. Respondent denies it has violated the Act as the complaint alleges.

After considering the entire record,[2] the testimonial demeanor of the witnesses, and the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

General Counsel alleges, Respondent admits, and I find that Respondent, at all times material to this proceeding, has been a corporation with an office and place of business in Washington, D.C., where it is engaged in the business of providing janitorial services for firms and institutions located throughout the Washington, D.C. metropolitan area, and, during the 12 months preceding the issuance of the complaints, a representative period, Respondent provided services valued in excess of $50,000 to firms located in the District of Columbia which meet at least one of the National Labor Rela-

[1] The more than 2-year hiatus in this case was due to an unavoidable delay in subpoena enforcement proceedings because a lengthy case of national import was then before the United States District Court with which the enforcement proceedings were initiated.

[2] At hearing I rejected G.C. Exhs. 20 and 26, which were identified as strike sign-in lists. After comparing known signatures of those employees, which signatures are also on other documents, with those signatures on the sign-in lists and concluding they were made by the same persons (Fed.R.Evid. 901(b)(3)); after comparing the names of the payees on union checks issued for picket line duty with the names on the sign-in lists and finding they match; and after considering credible testimony concerning the identity of strikers, together with the lack of evidence the sign-in lists were false and the fact it is more likely than not the sign-in lists accurately portray who the picketers were, I conclude my early ruling was in error and should be reversed. It hereby is reversed and G.C. Exhs. 20 and 26 are received in evidence.

tions Board's jurisdictional standards other than an indirect inflow or indirect outflow standard, and during this same period of time, Respondent purchased and received at its Washington, D.C. offices goods and materials valued in excess of $5000 directly from points located outside the District of Columbia. Respondent is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is now, and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

III. A PRELIMINARY MATTER

Respondent's motion at trial to continue the hearing until the National Labor Relations Board, which then had only two members, had a three-member quorum was denied. Respondent argues, in sum, that because there was then no three-member quorum, a direct appeal to the National Labor Relations Board from any of my rulings could not be acted on by the Board, and therefore, proceeding with the trial while the National Labor Relations Board's Rules and Regulations were not in force rendered the hearing a nullity, citing *Automobile Club of America v. NLRB*, 84 LRRM 2422, 71 LC ¶ 13,781 (D.C.D.C. 1973), enfd. 73 LC ¶ 14,471 (D.C. Cir. 1974). I am convinced by neither the syllogism propounded by Respondent nor the case cited, which is both distinguishable on its facts and inapplicable to the issue which Respondent raises, that the absence of a three-member quorum requires the suspension of the National Labor Relations Board's Rules and Regulations, or the postponement or continuance of unfair labor practice proceedings before an administrative law judge until a three-member quorum is attained. Respondent's argument is imaginative and interesting but not persuasive. I adhere to my former ruling.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. *The May 30 and July 26 strikes*

Some of the employees scheduled to work cleaning the buildings at 1919 M Street NW., and 1725 Desales Street NW. in Washington, D.C., on the evening of May 30, 1990,[3] elected to protest their working conditions by withholding their services that night. Accordingly, they did not work but engaged in picketing in front of the building at 1919 M Street as Albert Williamson credibly testified. Solomon Timoll, then an employee of Respondent at 1725 Desales Street, recalls that on that day he carried a sign stating employees wanted more money. Timoll does not recall at which of the buildings serviced by Respondent he carried the sign. Ketzi Ortiz distributed leaflets printed on the Union's letterhead alleging that Respondent was unlawfully harassing employees seeking better wages and benefits. It may be as James Hessey, a union agent, recalls that employees at other of Respondent's work locations also conducted a one-night strike on May 30, but it is doubtful inasmuch as the bonus, which will be further discussed later, given to nonstrikers was limited to Respondent's employees working at its 1919 M Street and 1725 Desales Street locations.

Williamson is credited that Alvin Singletary, Respondent's manager at the time,[4] passed by the pickets at 1919 M Street on the evening of May 30. Singletary is not a particularly believable witness. A large portion of his pretrial statement given to a National Labor Relations Board agent was read into evidence as a past recollection recorded of matters which Singletary purported to have no present memory. I perceive no reason to accord his pretrial statement any more credibility than that accorded his trial testimony. Here we have a member of management who is currently the project manager and was an operations manager in 1990. He is an intelligent and capable individual not likely to forget matters so significant to Respondent as strikes which have been the subject of charges and complaints for several years, and I do not believe his memory is as blank as his testimony implies that it is. He had respectable recollection of some matters, notably the award of a bonus to employees who did not engage in the May 30 work stoppage, and his recall that he awarded $20 bonuses to employees who worked the night of the strike because they performed twice their usual amount of work due to the employee shortage does not square with his purported failure to recollect that other employees were on strike at the same time.

On the evening of May 31 in the presence of all the employees, after the one-night strikers had returned to work, Singletary presented the aforementioned bonus checks to employees who had worked on May 30 along with the comment that the strikers would not get a bonus but employees who had not been on strike would.[5] Singletary concedes he gave a bonus to employees who worked on May 30 at 1919 M Street and 1725 Desales Street but credibly denies giving a bonus to Respondent's employees working anywhere else.

During the course of distributing the bonus checks as employees punched out for the night, Singletary shook bonus checks in front of James Wilson, an employee at 1919 M Street, as Wilson complained that Respondent had not cut a special check for him on an occasion when he had been due extra pay.[6] At a later time, probably the same or following night, Singletary told Wilson that had he remained and worked he could have gotten something out of it. Wilson had not been one of the strikers, but when he arrived at work on May 30 and found no one else there, he left and went home. He did not picket on May 30. Later in July, Singletary told Wilson that if he planned to strike he should not come back because he would be fired and be without a job. Within a few days thereafter, Singletary also told Wilson that employees who would not strike would get a bonus. Wilson recalls this latter comment was made to him within the week preceding the next strike, which commenced on or about July 26. James Hessey, the Union's organizing director at the time, credibly testified the Union had a series of meetings with Respondent's employees during the week before the strike culminating in a strike vote on July 25. I believe and conclude Singletary had knowledge of this prestrike activity

[3] All dates are 1990 unless expressly otherwise stated, and all the events considered in this decision took place in Washington, D.C.

[4] Respondent admits Singletary has been a statutory supervisor at all times material to this case.

[5] Williamson, a more believable witness than Singletary, is credited that Singletary made the statement referred to.

[6] Wilson's account of his contacts with Singletary impressed me as candid, uncontrived, and completely truthful.

when he made the statements to Wilson in July and that is why he made them.

Singletary made and adopted other statements to employees between May 31 and July 26[7] similar to his previous statements to Wilson. A few days before July 26, he advised employee Kelly Marshall that if employees went on strike again they would not be permitted to return to the building. Singletary made the same statement to Albert Williamson on another occasion, and, on or about July 19, made no comment while an employee stated to other employees within his hearing that Singletary had said that anybody who went on strike again could not return to the building. Inasmuch as this latter statement was made in Singletary's presence and within his hearing and he chose not to rebut it, I agree with General Counsel that he adopted the employee's statement and thereby communicated to the other employees present that if they went on strike they would not be permitted to return to their work stations.

I have found Singletary advised Respondent's employees that nonstrikers were given a bonus as a reward for not striking. Rewarding employees for not striking patently reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory right to engage in protected concerted activity and therefore violates Section 8(a)(1) of the Act. *Rubatex Corp.*, 235 NLRB 833, 834–835 (1978).[8] Telling strikers he had done so also violated Section 8(a)(1) of the Act. I have no reason to doubt that Respondent gave bonuses to employees on other occasions for other reasons, but, contrary to Respondent's posttrial argument, there is no convincing evidence Respondent ever before gave employees double pay when other employees failed to show up for work. I further find that Singletary's statements to Marshall and Williamson that they would be barred from their workplace if they participated in another strike and his adoption of an employee's statement to the same effect, is nothing less than a threat of retaliation against employees who dared to engage in a strike, which is a protected employee right. That threat violated Section 8(a)(1) of the Act.

The strike that commenced on July 26 pursuant to the employees' strike vote of July 25 involved employees at buildings serviced by Respondent at 1730 M Street NW, 1919 M Street NW, 1150 17th Street NW, and 1725 Desales Street NW. The Union provided union T-shirts, union buttons, and picket signs for the employees. The T-shirts had the message ''Justice for Janitors'' printed on them. It is not clear in the record what all the signs said, but from testimony on the matter I conclude they in substance charged Respondent with being an unfair employer, and that at least one sign said ''USSI is Unfair.'' General Counsel contends the strikes were economic in nature and not unfair labor practice strikes.

On August 2 the strikers voted to return to work. On August 3 James Hessey went to Respondent's office with several strikers and asked to speak with Singletary. When Singletary appeared Hessey told him the strike was over and the strikers were all making an unconditional request to return to work. After making this statement, Hessey presented a letter in an envelope to Singletary. The letter reads as follows:

JUSTICE FOR JANITORS
ORGANIZING COMMITTEE
Local 525/Service Employees International Union
1017 12th Street NW, Washington, DC 20005
(202) 898–1505

August 3, 1990

James Mathews, President
USSI
1434 K St., N.W.
Washington, D.C.

Dear Mr. Mathews

The employees employed by USSI at 1730 M St., 1725 Desales St., 11 50 17th St. and 1919 M St. that have been on strike sinceJuly 26, 1990, make an unconditional offer to return to work today, August 3, 1990.

All employees are prepared to return to work at their same position and building at the regular start time today, August 3, 1990.

If you have any questions, please contact me directly.

Organize
Jay Hessey
Organizing Director

Singletary refused to take the letter. Hessey then said the offer to return was still being made, laid the letter on the counter and left. The strike was organized and supervised by the Union pursuant to an employee strike vote and was ended by a union-conducted vote of the employees. The Union, in the person of Hessey, was clearly acting as the agent of the striking employees and the offer to return to work was made on behalf of all the strikers, not just the strikers who were with Hessey when he made the offer. Once the offer was made,[9] the economic strikers were entitled to reinstatement unless Respondent showed they had been permanently replaced or there was some substantial

[7] The complaint allegations of conduct on or about July 19, 20, and 21 are sufficient to cover the conduct shown by the evidence. *Action Auto Stores*, 298 NLRB 875, 885 fn. 21, 897 fn. 56 (1990).

[8] In determining whether certain statements violate Sec. 8(a)(1) of the Act, I have applied the time-honored test set out in *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949), and cases cited therein, to be whether the conduct in question reasonably tends to interfere with, restrain, or coerce employees in the exercise of their statutory rights.

[9] I am persuaded that Singletary knew or believed when he refused to accept the letter from Hessey that it was a written repeat of Hessey's oral offer on behalf of all the strikers to return to work. Singletary's refusal to accept Hessey's written offer on behalf of all the strikers to return to work does not diminish the validity of Hessey's oral offer on behalf of all the strikers to return to work, and Respondent cannot circumvent its legal obligations by the device of refusing to accept letters related thereto. The court of appeals noted in *NLRB v. Regal Aluminum*, 436 F.2d 525, 527–528 (8th Cir. 1971): ''Upon its refusal to accept the union's letters the company acted at its own peril as to the contents of the letters,'' and further pointed out that more than a century before, now 125 years ago, Justice Clifford observed:

> [I]t is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received. *The Lulu*, 10 Wall. 192, 201, 77 U.S. 192, 201, 19 L. Ed 906 (1869).

Justice Clifford's observations are as valid today as they were in 1869.

business justification for refusing them reemployment, in which case they are entitled to rehire when vacancies occur. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). The Board has held that General Counsel establishes a prima facie case of unlawful discrimination by proving that the economic strikers made an unconditional offer to return to work and that the Respondent failed to reinstate them, thereby presumptively discouraging the exercise of their rights under the Act. *SKS Die Casting*, 294 NLRB 372, 375 (1989). That is exactly what happened here. The burden is on Respondent to show the failure to rehire was due to replacements or other ''legitimate and substantial business justifications,'' *Fleetwood*, supra at 378. Respondent has not done so. Furthermore, even if there had been replacements, Respondent had a continuing obligation to establish a preferential hiring list and to rehire strikers as those replacements depart unless the strikers have in the meantime acquired regular and substantially equivalent employment elsewhere. *Laidlaw*, supra; *Gibson Greetings*, 310 NLRB 1286 (1993); *Laidlaw Waste Systems*, 313 NLRB 680 (1994). Respondent has not proven it has done this.

Respondent argues that it had no duty to reemploy those employees who struck more than once because they were engaged in intermittent striking, citing *Automobile Workers Local 232 v. WERB*, 336 U.S. 245 (1949), overruled in *Machinists Lodge 76 v. WERC*, 427 U.S. 132 (1976), on other grounds. The issue in *Automobile Workers*, supra, was whether the state had jurisdiction to permit the exclusion of intermittent strikers from statutory protection. In any case, *Automobile Workers* is inapplicable to this case because no intermittent striking here existed, the mere fact some employees may have struck more than once does not make their conduct intermittent striking. The Board in *Pacific Telephone Co.*, 107 NLRB 1547 (1954), the authoritative case in this area, found that ''hit and run'' strikes engaged in as part of a planned strategy which was intended to bring about a condition that was neither a strike nor work but was intended to ''harass the company into a state of confusion'' were not protected activity. In the instant case there is no evidence any such strategy was in place or that the strikes were for any purpose other than to protest and seek redress for what employees considered to be unjust working conditions. There was no unlawful intermittent striking.

The Union's records show strike benefits were paid to the employees named below for picket duty during the July 26 to August 3 period. It is not likely the Union was paying strike benefits to nonstrikers. I therefore conclude those employees of Respondent listed below who received such benefits were on strike during this period. Hessey's oral offer to Singletary, as well as the letter he left, was on behalf of all of these individuals, as well as any other strikers who may not have received such payments, and was sufficient to trigger Respondent's duty to offer them reinstatement. In addition to their offers to return to work conveyed by Hessey, several of the striking employees visited Respondent's office on and after August 3 seeking employment. Some were assigned work. Some were not. Whether any of the work assignments were adequate to meet the reinstatement requirement is not clear in the record before me and is a matter best left to subsequent compliance proceedings. The employees shown on the Union's records as recipients of strike benefits for the July 26 to August 3 period are:

Howard Adams	Bertram Madden
Atricia Armstead	Kelly Marshall
Evelyn Barnett	Melinda Moore
Marvin Beeman	Howard Murray
Sheila Bell	Ketzi Ortiz
Willie Bell	Merida Lee Ramirez
Rosa Lee Bunn	Philip Scott
Dye Carr	Douglas Spencer
Melita Christmas	Robert Taylor
Dave Cousley	Andrew Terry III
Veronica Gaither	Solomon Timoll
Sherwin R. Jackson	Albert Williamson
Randolph James	James Wilson
Pearly M. Jennifer	

The complaint originally alleged ''the Union, on behalf of the following employees of Respondent, and other employees whose names are presently unknown to the undersigned, but whose names are peculiarly within the knowledge of Respondent, who engaged in the strike . . . made an unconditional offer to return to their former positions of employment.'' It then listed all the employees named above with the exception of Sheila Bell. The complaint then proceeded to allege all the strikers named in the complaint as well as other strikers whose names were unknown to the Union, had neither been placed on a preferential hiring list or offered reinstatement as the law requires. At a later time, General Counsel amended the complaint to delete the names of Veronica Gaither, Pearly M. Jennifer, and Solomon Timoll. The complaint, as amended, is broad enough to cover all the employees listed above except for the three employees specifically deleted by General Counsel, and to cover any other striking employee not yet named who might have been unlawfully treated as the complaint alleges. The Union's offer on their behalf was broad enough to cover these named and unnamed strikers, and the Respondent had a duty to promptly rehire them absent a showing they had been replaced or that there was some legitimate and substantial business reason for not putting them to work instanter. Respondent has not proven either. Even if they had been replaced, the strikers were entitled to placement on a preferential hiring list.[10] Respondent maintained no such lists. To the extent Respondent's witnesses suggest there was or were at one time a list or lists of the type required, that testimony is not credited. In so concluding, I note Joel Felrice, Respondent's vice president, was an evasive witness given to circumlocution whose demeanor was less than impressive. His testimony is not credited where it is unsupported by other credible evidence, nor is that of Juan Lopez, a vague and unimpressive witness.

As the complaint alleges, by failing and refusing to honor the employees' unconditional requests for reemployment and by failing and refusing to erect a preferential hiring list for any strikers who may possibly have been replaced, Respondent violated Section 8(a)(1) of the Act. This conduct was predicted by Singletary when he threatened to refuse to let employees return to their workplace if they went on strike, and, I find, was retaliation against them for striking. I would find a violation of Section 8(a)(3) of the Act if it were al-

[10] *Teledyne Still-Man*, 298 NLRB 982, 983 (1990); *Gibson*, supra.

leged because the Respondent's conduct, I find, was an effort to discourage union membership. In any event, the remedy would be the same.

I am aware that Respondent made some contacts with employees concerning reemployment,[11] and did reemploy some of them, albeit in other work locations far removed from their previous places of employment. These efforts of Respondent are matters which may be more appropriately reviewed at the compliance stage of this proceeding should the Board adopt my recommendations.

B. *The October 30 Strike and Other Matters*

Employees at Respondent's 1050 Connecticut Avenue, 1909 K Street, and 1828 L Street locations struck, with union assistance, on October 30 and picketed until December 5 with signs protesting unfair working conditions. From the testimony of various witnesses, various letters directed to Respondent from the Union and employees, and strike sign-in sheets which bear signatures of employees like those on other documents and give every appearance of being valid, I conclude the following employees were on strike:

Jose Avilar	Gisela Sawyer
Rosa Berrios	Ade Thomas
Mary Burrell	Doris Brown
Luis Chavez	Angela Williams
Andres Gonzalez	Bernice Noble
Roosevelt Goodman	Donald Monroe
Carlos Reina	

The complaint in Case 5–CA–21691 names all the employees listed above as striking employees unlawfully denied reinstatement or placement on a preferential hiring list but does not include Avilar, Chavez, Goodman, and Reina, and it does not contain the reference to employees' names that are unknown to the Union but are alleged to be within the knowledge of Respondent, which reference appeared in the complaint in Case 5–CA–21399 covering the earlier strike. Inasmuch as General Counsel, as is his prerogative under Section 3(d) of the Act, has exercised his authority to restrict the allegations in Case 5–CA–21691 to encompass only the employees specifically named therein, my findings and conclusions in Case 5–CA–21691 will relate only to those employees specifically named in the complaint: Berrios, Brown, Burrell, Gonzalez, Monroe, Noble, Sawyer, Thomas, and Williams.

By letter dated November 7, Respondent sent a message to strikers. The record does not permit a definitive conclusion as to how many strikers were sent or received this letter. The letter reads, in pertinent part, as follows:

> We would like to offer you the opportunity to become re-employed with our Company and enjoy all the benefits USSI offers its employees (Dental insurance, vision benefit package, paid holidays, paid vacation, life insurance, etc.)
>
> Within two (2) days from the date you receive this letter, you MUST get in touch with JOSE VIERA OR JUAN LOPEZ, informing us of your interest in working with USSI again.
>
> Please come to our office at:
>
> 1424 ''K'' St. N.W. /BASEMENT
> WASHINGTON, D.C. 20005
> MONDAY–FRIDAY
> 1:30–6:00 P.M.
>
> Thank you.
>
> Sincerely,
> Argenis Jose Viera
> Unemployment Director.

Kevin Brown, the union agent who organized and directed the strike, responded by drafting a letter to Respondent dated November 16. He prepared two copies which are identical to the extent they read as follows:

> Dear Mr. Viera:
>
> This is to inform you that I am currently on strike and have not quit my job with USSI.
>
> I will notify you when I am prepared to return to work.

One copy contains the typed names and signatures of Bernice Noble, Angela Williams, and Doris Brown below the above-quoted message. The other copy bears the typed names of Mary Burrell, Gisela Sawyer, Ade Thomas, Luis Chavez, Jose Avilar, Andres Gonzalez, Carlos Reina, and Rosa Berrios along with the signatures of all but Berrios and Reina, whose names were signed by Brown with his initials appended to each to show he had signed on their behalf. Brown then went to Respondent's office and, in the company of 10 to 15 strikers, attempted several times to hand the letters to the persons working in Respondent's office. He believes one of those to whom he offered the documents was Viera, a statutory supervisor and agent of Respondent. Brown's perception that Viera was present has not been rebutted. Brown's repeated efforts to give the letters to the office staff were rebuffed. He then mailed them by regular mail to Joel Keiler, Respondent's counsel, thus creating a presumption they were delivered to Keiler in the regular course of the mails.[12] This presumption can be overcome by a credible and unequivocal denial of receipt.[13] Keiler does not unequivocally deny receiving the letters, but merely testified he had no recollection of ever receiving them and that if he had, he would not have forwarded them to his client because he is not a client's mailman and neither forwards documents from a union to his clients nor even tells them about it unless the mail is in the nature of a lawsuit or other legal document. At the time these letters were sent to him Keiler was representing Respondent on labor matters, particularly in Case 5–CA–21399, and was clearly Respondent's agent for purposes of litigating labor matters. The November 16 letters were received by Keiler in his representational capacity, and service was thereby effected upon Respondent. Turning to Respondent's rejection of the strikers' letters at Respondent's office, such rejection is subject to the rationale prescribed in *Regal*, supra, noting the quoted remarks of Jus-

[11] Some of these contacts or efforts to contact employees were apparently made after this proceeding opened before me.

[12] See, e.g., *Sears Roebuck & Co.*, 117 NLRB 522, 523 fn. 3 (1957).

[13] *S. Frederick Sansone Co.*, 127 NLRB 1301, 1302 (1960); *Thiele Tanning Co.*, 128 NLRB 19 (1960).

tice Clifford in *The Lulu*, that a refusal to accept letters does not absolve a respondent from knowledge of their content. It is reasonable to infer, as I do, that Respondent believed or suspected the union proffer of the letters in the presence of a substantial number of strikers on November 16 had something to do with Respondent's messages to strikers in its November 7 letter to them.

On December 5, Brown typed three letters to Respondent. They are identical in content with the exception that although one refers to 1828 L Street NW and names a striker there, Donald Monroe, another letter refers to 1909 K Street NW and names Angela Williams, Bernice Noble, and Doris Brown, and the third letter refers to 1050 Connecticut Avenue and reads as follows:

JUSTICE FOR JANITORS
ORGANIZING COMMITTEE
Local 525/Service Employees International Union
1017 12th Street NW, Washington, DC 20005
(202) 898–1505

December 5, 1990

To United States Service Industries at 1050 Connecticut Avenue, NW:

On Tuesday, October 30, 1990 the undersigned employees of USSI working at the 1050 Connecticut Avenue, NW location acted in concert by refusing to work in protest in the unfair work and low pay.

We make an unconditional offer to return to work this evening, December 5, 1990 at our regular time and position at the 1050 Connecticut Avenue, NW location currently cleaned by USSI.

If you wish to discuss this matter, please contact Jay Hessey at 202-898-1505.

Gisela Sawyer
Luis Chavez
Mary Burrell
Jose Avelar
Ade Thomas
Andres Gonzalez
Roosevelt Goodman

After drafting these letters, Brown engaged U.S. Express Delivery Service to deliver them. The testimony of Brown and Donald Rayford, the assistant to operations for the delivery service, and the records of the delivery service convincingly show that when it attempted to effect delivery of the letters at Respondent's offices, Respondent refused to accept delivery. Here again I find Respondent was stonewalling, the letters were served, and Respondent cannot now rely on ignorance of their content for the reasons previously expressed herein in the other instances it refused service. The Union, as before, sent the letters rejected by Respondent to Keiler via regular mail. I find he received them and service on Respondent was again effected by that receipt. The letter contains an unconditional offer of the strikers to immediately return to work.

Here again there is no convincing showing the strikers were offered reinstatement, any were ever placed on a preferential hiring list, any had been replaced, that there was some legitimate and substantial business justification for refusing them reinstatement, or that any of the strikers had acquired regular and substantially equivalent employment elsewhere.[14] Accordingly, I conclude Respondent violated Section 8(a)(1) of the Act on and after December 5 by refusing to reinstate or place on a preferential hiring list those employees who went on strike at 1050 Connecticut Avenue NW., 1828 L Street NW., and 1909 K Street NW.

According to Rosa Berrios, an employee striker, some time in mid-October 1990 she and other employees were told by Maria Munoz, a supervisor and agent of Respondent, that when they attended union meetings the Union was just taking up their time, and that was all she said. This is nothing more than an expression of opinion and does not violate the Act. Then, led by General Counsel in a purported effort to refresh her memory, Berrios expanded that Munoz told them not to get mixed up with the Union because it just took up their time and there were others who wanted to work. I place no weight on this latter testimony because it was the product of leading questions[15] and because Berrios previously testified with certainty that all Munoz said was that the Union was just taking up the employees' time when they attended union meetings. General Counsel has not here proven the alleged violation of Section 8(a)(1) of the Act.

Mary Burrell credibly testified that Munoz, some time in October, asked her how a union meeting had gone. Burrell replied she did not know because she had not attended the meeting. Munoz' question was impermissible interrogation of Burrell concerning her union activities and that of other employees and therefore violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On May 30, 1990, certain employees of the Respondent working in buildings located at 1919 M Street NW and 1725 Desales Street NW Washington, D.C., engaged in a 1-day economic strike and picketed at those locations.

4. By giving bonuses to those employees at 1919 M Street NW and 1725 Desales Street NW Washington, D.C., who did not strike as a reward for not striking, Respondent violated Section 8(a)(1) of the Act.

5. On July 26, 1990, employees of Respondent working at 1730 M Street NW, 1919 M Street NW, 1150 17th Street NW, and 1725 Desales Street NW, Washington, D.C., engaged in an economic strike at those locations.

6. On August 3, 1990, the employees referred to in paragraph 5 above unconditionally offered to return to work.

7. Respondent, commencing on or about August 3, 1990, and continuing to date, has violated Section 8(a)(1) of the Act by unlawfully failing and refusing to reinstate or place on a preferential hiring list its employees whose names appear below, and any other employees whose names are un-

[14] As in the earlier strikes, the testimony of Respondent's witnesses to the contrary was unsupported by any evidence of substance, documentary or otherwise, amounts to no more than their say so, was unbelievable, and is not credited.

[15] See *H. C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977).

known to me but whose names are known by Respondent, because they engaged in protected strike activity:

Howard Adams	Bertram Madden
Atricia Armstead	Kelly Marshall
Evelyn Barnett	Melinda Moore
Marvin Beeman	Howard Murray
Sheila Bell	Ketzi Ortiz
Willie Bell	Merida Lee Ramirez
Rosa Lee Bunn	Philip Scott
Dyeman Carr	Douglas Spencer
Melita Christmas	Robert Taylor
Dave Cousley	Andrew Terry III
Sherwin R. Jackson	Albert Williamson
Randolph James	James Wilson

8. On October 30, 1990, employees of Respondent working at 1050 Connecticut Avenue NW, 1909 K Street NW, and 1828 L Street NW., Washington, D.C., engaged in an economic strike at those locations.

9. On or about December 5, 1990, the employees referred to in paragraph 8 above unconditionally offered to return to work.

10. Respondent, commencing on or about December 5, 1990, and continuing to date, has violated Section 8(a)(1) of the Act by unlawfully failing and refusing to reinstate or place on a preferential hiring list its employees whose names appear below because they engaged in protected strike activity:

Rosa Berrios	Doris Brown
Mary Burrell	Angela Williams
Andres Gonzalez	Bernice Noble
Gisela Sawyer	Donald Monroe
Ade Thomas	

11. By telling employees they will be discharged or otherwise retaliated against if they strike, Respondent violated Section 8(a)(1) of the Act.

12. By interrogating employees concerning the content of a union meeting, Respondent violated Section 8(a)(1) of the Act.

13. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist and notice-posting requirement, Respondent will be required to pay each of the May 30 strikers the amount of the bonus paid to nonstrikers on May 31 ($20), with interest, and Respondent will be ordered to offer the July 26 to August 3 strikers and the October 30 to December 5 strikers reinstatement to the jobs they held at the time they went on strike, without prejudice to their seniority and other rights and privileges, or to substantially equivalent positions if those jobs no longer exist, and make them whole for any loss of earnings and other benefits suffered as a result of Respondent's discrimination against them. Backpay, with interest, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[16]

[Recommended Order omitted from publication.]

[16] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.